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ENFORCEMENT OF A RIGHT OF ACTION ACQUIRED UNDER FOREIGN LAW FOR DEATH UPON THE HIGH SEAS.[1]

II.

TO give a right of action for death upon the high seas is certainly not to make that maritime which was not maritime before.

In Hughes on Admiralty the learned author, after showing that there was an action for death under the law of France, Holland, Germany, and Scotland, says:[2]

"As these countries administer the law substantially the same in all their courts and do not have common law courts with one system and other courts with another system, the doctrine with them applies on land and sea alike. This prevalence of the doctrine among the leading Continental nations would seem to settle that it is at least sufficiently recognized to entitle it, in so far as it may be maritime in nature, to be considered a part of the general body of maritime law as administered by maritime nations. In other words, any other nation that may choose to adopt it into its jurisprudence is not making something maritime that was not maritime before, is not extending the limits of the general maritime law, but is merely drawing from that fountain something that was there already."

It should be further noted that as regards the question whether there is any right of action for death, there is no rule belonging specially to the maritime law as such. The question belongs to the general body of the municipal law which regulates the ordinary fundamental rights of person and property on land and sea, and which underlies the maritime law as the basis of its admin-

[1] Continued from 21 HARV. L. REV. 22.

[2] Hughes, Adm., 198.

istration. In a given country there will or will not be a right of action for death in the admiralty according as the municipal law does or does not give the right.

Chief Justice Waite, delivering the opinion of the court in The Harrisburg,[1] said:

"We know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched. . . . The argument everywhere in support of such suits in admiralty has been, not that the maritime law, as actually administered in common law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to 'natural equity and the general principles of law.' Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are not different from those under the common law." [2]

In The City of Norwalk [3] Judge Brown, delivering the opinion of the District Court for the Southern District of New York, said: [4]

"It was upon the recognition of this principle alone, as I understand, that in the case of The Harrisburg, 119 U. S. 199, 213, 7 Sup. Ct. Rep. 140, it was decided that no action could be maintained in a court of admiralty of this country for loss of life, aside from statutory authority; namely, because there is no rule on this subject belonging specially to the maritime law as such. 'It [the maritime law] leaves the matter untouched.' . . . And since the maritime courts in each country follow their own municipal law as regards giving damages for death, and inasmuch as by the common law of this country such a cause of action does not survive, the latter rule must, therefore, obtain in our courts of admiralty. In other words, it is the municipal law that on such a point determines the law applicable in a court of admiralty."

It is clear that there is a large class of questions, including the question as to whether there is a right of action for death, which,

[1] 119 U. S. 199, 213.
[2] See The Max Morris, 28 Fed. 881, 884.
[3] 55 Fed. 98.
[4] P. 107.

while they form a part of the general maritime law of a nation and frequently are to be decided by its courts of admiralty, nevertheless are solved by reference to the municipal law thereof. In other words, a large part of that law is necessarily a part of the maritime law. In the field of rights that is common to both the municipal and maritime law there can be no modification or amendment, unless expressly confined to one, that does not affect both systems. All civilized maritime states must and do recognize that, in matters where there is no peculiar or special rule of the maritime law, the maritime law of a nation cannot be expected to adopt, in respect of the ordinary fundamental rights of person and property, any different rules than are prescribed by its municipal law. The concession that any portion of the admiralty law is identical with the municipal law involves the admission of the fullest right of change and modification, at least within the common ground. The municipal law, of course, may be altered at the will of the nation. To hold that the maritime law cannot, would be to create, at the first change in the municipal law within the common ground, a difference between the two systems. The truth is that within this field it is expected, and generally conceded, as observed by Judge Brown,[1] that "the administration of the law in the maritime courts of different countries, therefore, though it might be the same in all that is peculiar to the maritime law, might in other respects differ widely, through the differences in the municipal law which in part enters into the adjudication of maritime causes."

As the question as to the right of action for death in the admiralty courts must be determined by reference to the municipal law, it follows that all the maritime states must recognize the right of each to give or withhold a remedy, according to the dictates of its municipal law, in respect of deaths occurring on the high seas, when its jurisdiction is invoked, whatever may be the nationality of the parties litigant.

If, therefore, there is any merit in the argument that as the admiralty jurisdiction rests on consent there is a limit to the changes which any one nation may make in its maritime law, at any rate, as far as foreigners are concerned, it has no applicability to the question under discussion.

It follows that according to the fundamental principles of the admiralty jurisdiction it is competent for France, by statutes and

[1] The City of Norwalk, *supra*.

decisions, not only to confer a right of action for death on the high seas upon a foreigner against a French citizen, but also on a French citizen against a foreigner, and it is the duty of the admiralty courts of all countries, the United States included, to recognize the competency of the French courts so to do.

The enforcement of the libellant's right under French law would not be contrary to the policy of the laws of the United States. The mere fact that the general maritime law, as understood and practiced in the United States, affords no remedy for death does not warrant the inference that such an action is contrary to the policy of the laws of the United States.[1] If it did, a right accruing under foreign law could never be enforced if the law of the forum did not give a similar right, whereas in fact, as has been seen, the law is clear, at least in the federal courts, that it is immaterial whether the law of the forum gives a similar right or not.

If the enforcement of the right acquired by the libellant under the French law conflicted with any right conferred on the defendant by the law of the United States, an American admiralty court, it is conceded, ought not to enforce the libellant's right and thereby abrogate or nullify the rights acquired by the defendant, though a foreigner, under the law of the United States.

Thus, navigation regulations were long ago enacted by Congress the effect of which was to give immunity from liability in case of collision to all United States citizens who conformed to those rules, and a right of action against those who violated the rules.

As said by Mr. Justice Strong in The Scotia: [2]

"If it were that the rules of the two nations conflicted, which would the British vessel, and which would the American, be bound to obey? Undoubtedly, the rule prescribed by the government to which it belonged. And if, in consequence, collisions should ensue between an American and a British vessel, shall the latter be condemned in an American court of admiralty? If so, then our law is given an extra-territorial effect, and is held obligatory on British ships not within our jurisdiction. Or might an American vessel be faulted in a British court of admiralty for having done what our statute required? Then Britain is truly not only mistress of the seas, but of all who traverse the great waters."

So, where a suit was brought in an American admiralty court for damage received during the voyage by cargo shipped by an Amer-

[1] Evey *v.* Mexican Cent. Ry. Co., 81 Fed. 294, 304.

[2] 14 Wall (U. S.) 170. See also The Belgenland, 114 U. S. 355, 370; The State of Alabama, 17 Fed. 847, 855.

ican citizen on a British ship for transportation from a port of the United States to a British port under a British bill of lading signed by a British master, it was held that the provision in the bill of lading exempting the carrier in case of negligence of his servants would be no defense, irrespective of the question of public policy. The court held that although there was a good defense under the general maritime law of Great Britain, there was none under the general maritime law of the United States, and that the latter, viewing the transaction in its character of a tort upon the high seas, must prevail.[1]

Obviously there the court could not extend to the defendant the immunity granted him by the British maritime law, because the American law had given the plaintiff a right of action of at least an equally high nature. Therefore, if the fact that the maritime law of the United States gave no right of action for death on the high seas was equivalent to an express right of immunity from liability to suit, there is no reason to doubt that it gave such right to every one, citizen or foreigner alike, and admiralty courts of the United States should not, by enforcing a right of action for death on the high seas given by the law of France, violate the right conferred by the law of the United States on the defendant. But it would be monstrous to hold that because no law binding on the admiralty courts of the United States has provided a civil remedy for death, therefore a right was conferred wrongfully or negligently to cause death, especially when the very acts which caused the death would, if followed by injuries merely, give rise to a right to recover damages.[2]

Because the law in providing a remedy for injuries caused by the negligence of another has failed to provide a remedy for the greatest of all injuries, death, it can hardly be contended that a general right is conferred on every one to be as negligent as he pleases, providing his victim is killed and not merely injured.

The result must be the same whether the statutory action for death proceeds upon the theory of a right accruing at the moment of death and passing by succession to the personal representative, or upon the theory of a new and independent right of action created for the benefit of those who suffer pecuniary loss by reason of the death. As against the deceased, it is clear that no one has any right to do what is liable to cause injury, whether attended with

[1] The Brantford City, 29 Fed. 373, 382.

[2] Stewart *v.* B. & O. R. R. Co., 168 U. S. 445.

death or not. It would seem preposterous to hold that as against those suffering pecuniary loss from the death there is a right to do such an act because the law does not give them a remedy for their loss. What the law denounces as wrongful because of its effect on A to the extent of clothing A with a right of action cannot be considered rightful as to B who has no right of action, so that the person committing the act wrongful as to A must be regarded as possessing an absolute and positive right to do the act as against B. It cannot upon any sound principle of public policy be held that the law gives any one the right under any circumstances wrongfully to cause death. The discussion, of course, assumes that the right sought to be enforced is not in the nature of a penalty, such a right on familiar principles not being enforceable in a foreign jurisdiction.

That the mere absence of remedy is by no means equivalent to clothing the offender with positive immunity is aptly illustrated by the well-considered case of The Avon.[1] A ship belonging in the Province of Ontario and owned there, having collided with an American ship in the Welland Canal, was, on subsequently coming into an American port, libelled by the owners of the American ship in a court of admiralty of the United States. It was objected by the claimants that as the canal was exclusively in British territory and was exclusively British property, and as there were no admiralty courts in the Province of Ontario where the canal was located, and no admiralty jurisdiction in force there, the ship was not liable to seizure, at least as against a citizen of Ontario who had bought her after the collision and before the libel was filed. The court, however, sustained the libel, holding that although the *lex locus delicti* was exclusively within British territory, it was nevertheless within the jurisdiction of an American admiralty court, and that had the "collision occurred between two American ships, and no transfer had been made within the Dominion of Canada," there would have been no question of the right of the libellant to hold the vessel. The court conceded that if from the absence of the admiralty jurisdiction in Ontario it was to be inferred "that the principle of maritime law now sought to be enforced, is excluded by that of Canada, the remedy *in rem* should be denied." But it was held to be "not enough *per se* that a collision happens where there is municipal power to exclude the

[1] Brown Adm. (U. S.) 170.

maritime rule. It must further appear that it has actually done so." The court thought that "where both litigants are subjects of the country where the transaction occurs, and where no such remedy exists," our courts should refuse it between them, but repeated its conviction that "where the maritime law is clear, the mere absence of a local court to enforce its liens will not prevent an American court of admiralty from so doing." [1] The court accordingly enforced the familiar doctrine of the admiralty that a collision lien prevails even over a subsequent *bona fide* purchaser for value. It is certainly as competent for France by her general maritime law to confer a right of action on an American citizen in respect of a transaction occurring on the high seas as it was for the United States by its general maritime law to vest in one of its own citizens a right of property, good against all the world, in a vessel belonging to a British subject in respect of a transaction occurring exclusively within the British territory. The principle is the same in both cases. Wherever a court has jurisdiction of the subject matter and the parties, it may enforce any right, whether arising under the law of the forum or under foreign law, provided it does not conflict with a right acquired under some other law having concurrent jurisdiction in the premises.

It results that in the case under consideration, where the court obtained personal jurisdiction over the defendant, the libellant set out in his libel a right of action, transitory in its nature, duly acquired under the general maritime law of France. The District Court had jurisdiction of the cause of action in consequence of its maritime nature as a tort upon the high seas. The French maritime law was competent to give the right of action, so that a judgment in a French admiralty court would be recognized as valid in foreign jurisdictions. The enforcement of the right would not have been in conflict with the policy of, nor inconsistent with any right given by, the laws of the United States. Yet the court refused to enforce the right. The court might have at least gone to the extent of giving effect to the right in favor of a citizen of the United States.

In Mulhall *v.* Fallon [2] Chief Justice Holmes, delivering the unanimous opinion of the Supreme Judicial Court of Massachusetts, said: [3]

[1] *Cf.* The Eagle, 8 Wall. (U. S.) 15; Panama Railroad *v.* Napier Shipping Co., 166 U. S. 280.

[2] 176 Mass. 266.

[3] P. 268.

"It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another state. But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered." [1]

However, if the admiralty courts of the United States are to refuse to enforce such a right in favor of a foreigner against a citizen of the United States, it would not much shock our sense of justice, however it might appear to our common sense, if they were to refuse to treat a citizen of the United States any better when he appeared as plaintiff. If the foregoing considerations are sound, the right should be enforced in either case.

It might be suggested that the result of this doctrine would be to enable the plaintiff in any kind of a controversy to pick out an admiralty jurisdiction favorable to his claim and demand to have the right conferred on him by the law of that jurisdiction enforced by the court in which he sued. If that were the inevitable result of the doctrine, it would, of course, be intolerable. Such, however, is not the inevitable result. There was a time when the courts of a nation might have established as a rule of law that they would enforce no such right, and the legislature may today by duly enacted laws deal with the subject as it sees fit. Beyond a doubt the courts, in a proper case, have still the authority where a rigid adherence to the principle laid down in Dennick *v.* The Central R. R. of N. J.[2] would lead to confusion or otherwise undesirable results, to pare down or revise the doctrine so as to make it adaptable to the needs of the community. So in the case supposed the admiralty courts of the United States, for instance, might say that while it was a rule of law in the United States that its courts should enforce rights duly acquired under foreign law, no consideration could or would be served by enforcing in a controversy between French and American parties litigant in relation to a transaction on the high seas a right of action arising under the maritime law of any other nation than France or the United States.

Of the authorities relied on by the District Court and the Court of Appeals in support of their conclusions that a right of action acquired under the maritime law of a foreign country for death on the high seas cannot be enforced in an American admiralty court

[1] See also The E. J. Ward, Jr., 17 Fed. 456.

[2] 103 U. S. 11.

where one of the parties is an American,[1] none requires any particular comment so far as this article is concerned, except the dicta in The Scotland.[2] Both courts in the Rundell case seemed to think that the language there, repeated as it was in The Belgenland[2] and The Brantford City,[2] completely covered the case before them, and was adverse to the libellant. It is important, therefore, to consider the exact point involved in these cases and the context out of which the language grew.

In The Scotland the suit was *in personam* against the owner, a British corporation, of the Scotland, a British steamship, for damage to property caused by collision on the high seas between it and the American ship Kate Dyer. The owner of the Scotland claimed the benefit of the limitation of liability acts of the United States. The libellant contended that those acts, properly construed, were not intended to apply to foreigners. The court, however, held that the acts did apply to foreigners, and that the owner of the Scotland was entitled to the benefit thereof. It will be seen, therefore, that the decision was purely a question of construction.

In the course of its opinion, however, the court said:

"If a collision occurs on the high seas, where the law of no particular state has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would, *primâ facie*, determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practised therein, would properly furnish the rule of decision. In all other cases, each nation will also administer justice according to its own laws. . . .

"Each nation, however, may declare what it will accept and, by its courts, enforce as the law of the sea, when parties choose to resort to its forum for redress. And no persons subject to its jurisdiction, or seeking justice in its courts, can complain of the determination of their rights by that law, unless they can propound some other law by which they ought to

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[1] The Harrisburg, 119 U. S. 199; The Alaska, 130 U. S. 201; The City of Norwalk, 55 Fed. 98; Robinson *v.* Navigation Co., 73 Fed. 883; United States *v.* Rodgers, 150 U. S. 249; The Scotland, 105 U. S. 24; Insurance Co. *v.* Brame, 95 U. S. 754; Butler *v.* Steamship Co., 130 U. S. 527; Armstrong *v.* Beadle, 5 Sawy. (U. S.) 484; The Belgenland, 114 U. S. 355; The Brantford City, 29 Fed. 373.

[2] *Supra.*

be judged; and this they cannot do except where both parties belong to the same foreign nation; in which case, it is true, they may well claim to have their controversy settled by their own law. Perhaps a like claim might be made where the parties belong to different nations having the same system of law. But where they belong to the country in whose forum the litigation is instituted, or to different countries having different systems of law, the court will administer the maritime law as accepted and used by its own sovereignty."

The court further said: "Of course the rule must be applied, if applied at all, as well when it operates against foreign ships as when it operates in their favor." That is to say, if the Englishman sued the American in the United States the latter would be entitled to limit his liability under the Acts of Congress, and the Englishman would not be entitled to have the English rule, which would be less favorable to the respondent, applied as the law governing the case. The law of each nation in such a case would create specific rights and duties, which would be more or less conflicting, in respect of a transaction over which each had equal jurisdiction. Under such circumstances the American courts could not be expected to enforce the English law in preference to their own. Some indication is here afforded of what the court had in mind; namely, a conflict of rights acquired under the laws of countries having equal jurisdiction over the subject matter of the controversy. In such a case the rule would unquestionably be accurate.

In The Belgenland neither party claimed to have his case adjudged by the law of his own country. The only issues, apart from the merits of the controversy, were whether the District Court had jurisdiction, whether the assumption of jurisdiction was discretionary, and if so, whether the discretion had been rightly exercised. As the parties propounded no other law by which the suit should be governed than the law of the United States, the court could do nothing else than apply the law of the forum. Here too, therefore, the above-quoted remarks were dicta. That the court had its attention fixed on a case of conflicting rights is to some extent indicated by its observation that "neither party has any peculiar claim to be judged by the municipal law of his own country."

Such was unquestionably the case in The Brantford City.[1] Each party demanded the enforcement of rights acquired under the law

[1] A well-considered decision that received the approval of the Supreme Court in Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397.

of his own country. Those rights conflicted. The English law conferred a specific immunity on the defendant. The American law gave a specific right of action to the libellant. Neither side had any peculiar claim to be judged by the law of his own country. It would be unjust to choose the English law because one of the parties was English. It would be equally unjust to choose the American law because one of the parties was American. The inevitable result was the application of the law of the forum as the only alternative.

It is not improbable, therefore, that Mr. Justice Bradley in announcing the propositions now under discussion did not have in mind all the possible contingencies that might be covered by his language if taken literally, but was framing a rule to cover cases where different rights are acquired under the law of the countries of the several parties, where those rights are conflicting, and where each party insists on the rights so acquired by him.

It may be of use to indicate the different situations that may grow out of transactions occurring on the high seas. They may be classified as follows:

1. Cases where both parties belong to the country of the forum.
2. Cases where one of the parties belongs to the country of the forum and
   - *a.* Each party seeks the application of the law of his own country;
   - *b.* Each party seeks the application of the law of his opponent's country;
   - *c.* Each party seeks the application of the law of the forum; and
   - *d.* Each party seeks the application of the foreign law.
3. Cases where neither of the parties belongs to the country of the forum, but both belong to the same foreign country or to different foreign countries having similar laws, and
   - *a.* Both seek the application of the foreign law;
   - *b.* Both seek the application of the law of the forum;
   - *c.* One party seeks the application of the law of the forum and the other seeks the application of the foreign law.
4. Cases where neither of the parties belongs to the country of the forum but both belong to different foreign countries having dissimilar laws, and
   - *a.* Both parties seek the application of the law of the forum;
   - *b.* One of the parties seeks the application of the law of the forum;
   - *c.* Each party seeks the application of the law of his own country;
   - *d.* Each party seeks the application of the law of his opponent's country; and
   - *e.* Both parties seek the application of the law of the country of one of them.

A subdivision of 1 might be made, but would be superfluous, as, for reasons already stated, in transactions occurring on the high seas rights acquired under the laws of any countries other than those of the contending parties should be disregarded.

According to the rule of The Scotland,[1] if literally construed without reference to the context, the law of the forum would be applied in 1, 2, and 4. The foreign law would be applied in 3. It is obvious that the wishes of both parties to the litigation might in many instances in this way be violated.

The question is plainly an intricate one, and it is dangerous to try and lay down a rule designed to cover all cases. It is not believed that Mr. Justice Bradley ever intended so to do. The rule as it stands appears to be based to some extent at least on the presumed wishes of the parties. Yet its application, if literally interpreted, would often thwart the wishes of both parties. It also apparently rests in part on the proposition that a court will *primâ facie* administer its own law. Yet it calls for the enforcement of foreign law as against a foreigner seeking the application of the law of the forum.

The rule creates confusion by its method of approaching the subject. No man has any right to have one law rather than another applied to his case. No court should have any predilection for administering its own law rather than any other law, nor assume, because litigants usually seek to be adjudged by the law of their own countries, that they always do. The question is really one of legal rights and should be expressed in terms of legal rights.

The first questions for the court should always be what right does the plaintiff assert, and under what law does the asserted right arise. If the right appears to have been acquired under foreign law, the next subject of inquiry is whether the foreign law was competent to give it. If it was, and the enforcement of the right would not be contrary to the public policy, or in conflict with any right conferred by the law of the forum, then what possible reason can there be for refusing to enforce the right and thrusting forth the law of the forum as the governing rule? Where, in a controversy between parties of different nationalities, one of them seeks the enforcement of a right arising under foreign law, it will appear either that the law of the countries in-

[1] *Supra.*

volved is the same, in which case there would be no difficulty, or that there is a difference. In the latter case a specific conflicting right may be conferred on the opposing party, or the difference may simply be that no remedy is provided for the enforcement of an undoubted right. If the party stand on his conflicting right, here will clearly be a case for the application of the law of the forum. But it being his right and not the court's, he is entitled to waive it.

For example, a French ship and an English ship collide on the high seas, and a libel is instituted in an American admiralty court. Suppose the Frenchman asserts some right acquired under the French law, different from the American rule. The court refuses to enforce the right, because, perhaps, the English law gives contrary rights. Could not the Englishman waive the rights, if any, created by the English law and by the law of the forum, and thus submit the controversy to be governed by the French law? He may take a different view of that law than the Frenchman and regard his chances as better under that law than under his own or under the law of the forum.

Surely the court ought not to impose its own law for the sake of so doing, nor seek to enforce rights which no one asserts or which all waive. And so where the difference lies simply in the failure to provide a remedy for the enforcement of an undoubted right, there being no right in either party to call for the application of one law rather than another, the court being indifferent which law is applied, but being bound to enforce legal rights if it can without violating any other rights of equal value, — the party asserting the absolute right under the foreign law is entitled to have it enforced.

The rule of The Scotland,[1] if it be assumed to have been enunciated with reference to cases of conflicting rights insisted upon by the parties, is correct. It was probably intended to go no further. If it was, it is unsound.

There is no English authority directly in point. The jurisdiction of the English admiralty is governed by Section 7 of the Admiralty Court Act of 1861,[2] which provides "that the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." In 1868 Sir Robert Phillimore held that under this section a suit *in rem* lay in the admiralty to enforce a claim for loss of life under Lord Campbell's Act.[3] In 1870 the same judge

[1] *Supra.*

[2] 24 and 25 Vict., c. 10.

[3] 9 and 10 Vict., c. 93; The Guldfaxe, L. R. 2 A. & E. 325.

held that a proceeding *in rem* in the admiralty would lie in behalf of the legal representatives of French citizens on board a French ship, who were lost in a collision on the high seas between that ship and an English ship.[1] Finally, in 1877 Sir Robert Phillimore, following his two earlier decisions, held, in the case of a collision in the Straits of Dover between a German ship and a British vessel, that the English administratrix and widow of a British citizen who was on board the British vessel and was lost in the collision, could maintain a proceeding *in rem* under Lord Campbell's Act for the death.[2]

In the meantime in 1871 and 1872 the cases of Smith *v.* Brown,[3] James *v.* London & South Western Railway Company,[4] and Simpson *v.* Blues [5] were decided, by which cases The Guldfaxe and The Explorer were supposed to have been shaken.

In Smith *v.* Brown the admiralty court was prohibited by the Queen's Bench from taking jurisdiction of a proceeding *in rem* to enforce a right of action under Lord Campbell's Act for death occurring upon the high seas, on the ground that the damage referred to in Section 7 of the Admiralty Court Act did not include loss of life.

In James *v.* London & South Western Railway Company it was held that the admiralty court should be prohibited from entertaining a petition for the limitation of liability against certain claims for damages, including suits for loss of life occurring on the high seas. The decision both in the Court of Exchequer and in the Exchequer Chamber was based on the ground that the vessel was not under arrest when the petition to limit liability was filed. It was, however, stated in the Court of Exchequer, although the decision was not based on that ground, that the admiralty court could not entertain a suit for loss of life under Section 7 of the Admiralty Court Act.

In Simpson *v.* Blues it was held that as the admiralty would have no jurisdiction over a suit for the short delivery of cargo shipped under a charter party, the County Court would have no such jurisdiction, although it was provided by statute [6] that such court should have jurisdiction to try causes as to any claim arising out of any agreement made in relation to the use or hire of a ship, provided the amount claimed did not exceed

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[1] The Explorer, L. R. 3 A. & E. 289.
[2] The Franconia, L. R. 2 P. D. 163.
[3] L. R. 6 Q. B. 729.
[4] L. R. 7 Exch. 187, s. c. 7 *ibid.* 287.
[5] L. R. 7 C. P. 290.
[6] 32 and 33 Vict., c. 51, s. 2, § 1.

£30. It will be seen, therefore, that if The Explorer and The Franconia were shaken by the cases in the Queen's Bench, The Exchequer, and the Common Pleas, it was not at all on the ground that an action would not lie for or against foreigners in case of loss of life on the high seas, but solely on the ground that under Section 7 of the Admiralty Court Act the courts of admiralty had no jurisdiction of a suit under Lord Campbell's Act.

In 1884 the matter came before the House of Lords in Seward *v.* Vera Cruz.[1] This case arose out of a collision at the mouth of the Mersey between the Vera Cruz, a Spanish vessel, and a British vessel, the master of which was drowned. His personal representative brought an action *in rem* against the Vera Cruz to recover for the death. It was held that the liability of the shipowner under Lord Campbell's Act to make good damages caused by the master's negligence was not damage done by a ship, and that therefore the action would not lie. The House of Lords appears to have proceeded on the theory that inasmuch as the only action for damages for loss of life was that created by Lord Campbell's Act, and inasmuch as the action created by Lord Campbell's Act depended upon wrongful act, fault, or negligence, it could not be said that a ship, an inanimate thing, could be guilty of wrongful act, fault, or negligence, however much the persons in charge of it might be culpable.

Since, however, the admiralty court is now a division of the High Court, a proceeding *in personam* under Lord Campbell's Act may be instituted and maintained in the admiralty.[2]

It would appear, therefore, that the English law, as these decisions left it, was that in case of loss of life on the high seas a proceeding *in personam* might be maintained under Lord Campbell's Act in the English courts, although against British subjects, for the death of a foreigner, and against foreigners for the death of British subjects, provided, of course, the requisite jurisdiction of the parties existed.

The question again arose in Adam *v.* British and Foreign Steamship Co., Ltd.[3] In that case a Belgian subject on board a Belgian ship lost his life in a collision on the high seas between the Belgian ship and a British ship. The court held that a personal

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[1] 10 App. Cas. 59.

[2] The Bernina, L. R. 12 P. D. 58, s. c. on appeal, 13 App. Cas. 1; The Orwell, L. R. 13 P. D. 80.

[3] [1898] 2 Q. B. 430.

action under Lord Campbell's Act did not lie in behalf of the personal representative of the mother of the deceased. The decision of the court was based solely upon its construction of Lord Campbell's Act, the court saying that the act was not intended by Parliament to apply to foreigners.

In Davidsson *v.* Hill [1] an exactly contrary decision was reached on precisely the same state of facts. Furthermore, Kennedy, J., said:

"It is not necessary to decide whether, assuming, of course, that no technical difficulty arises as to the service of proceeding, the action could be maintained in the English courts, the death occurring through negligence in a collision upon the high seas, where both parties were foreigners or where the wrongdoers were foreigners and the sufferers English. My personal opinion is that the action could be maintained, but I desire to be understood as not expressing, as it is not necessary to express, a decided opinion upon this point."

There never has been any question of the power of Parliament to give a right of action binding upon foreigners for death occurring upon the high seas. The only question in the English courts has been whether Parliament has exercised its power, and the probability is that in the future the English courts will hold that Lord Campbell's Act was intended to apply to transactions occurring upon the high seas both in behalf of and against foreigners.

While one nation is not always ready to accord to other nations the same measure of power which it itself exercises, nevertheless it may fairly be assumed that England would recognize the right in other nations to deal with cases of death upon the high seas in the same manner. If that is true, it follows that the English courts would, under the circumstances of the Rundell case, have enforced the right of action which arose under the French law.

As to the desirability on grounds of policy of allowing recovery under such circumstances, there would seem to be hardly room for more than one opinion. It is true, of course, that there would still be left many cases of wrongful death upon the high seas where there would be no remedy. But that is scarcely a reason for denying such measure of relief as the law in its present state warrants, especially in view of the fact that the law as administered in the admiralty courts of the United States would, by the establishment of the doctrine here contended for, be brought appreciably

[1] [1901] 2 K. B. 606.

nearer to what is now an almost universal rule among civilized communities; namely, that there shall be a right of action for wrongfully or negligently causing death. The fact that most of the European nations and substantially all of the states of the United States have adopted this rule shows that it is founded on a recognized moral principle which the law should approach rather than avoid. It may be suggested that the doctrine entrenches upon the limited liability rule. But it should be remembered, as already pointed out, that the federal courts have already taken the step of enforcing rights of action under state statutes for death occurring on state territorial waters, thereby imposing upon shipowners a far more serious liability than would be imposed by the adoption of the rule urged in this article. Furthermore, the liability for damages for causing death on the high seas may be limited as well as any other liability.[1]

In any event a man's life is more important than his property.

G. Philip Wardner.

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[1] Butler *v.* Boston Steamship Co., 130 U. S. 527.